

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CURTIS BARNETT,

03-CR-30170 DRH

Defendant.

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction and Background

On February 17, 2004, the Court held oral argument on Barnett's Motion to Suppress Evidence/Quash Arrest (Doc. 11). After hearing testimony from Government witnesses and argument of both parties, the Court took the matter under advisement. For the reasons set forth below, the Court denies the motion.

On August 20, 2003, the grand jury indicted Curtis Barnett for being a felon in possession of a firearm in violation of **18 U.S.C. § 922(g)(1)** (Doc. 1). Specifically, the grand jury charged Barnett with possessing two firearms on April 15, 2003. Barnett pled not guilty to the charge on August 26, 2003 (Doc. 2). On February 4, 2004, Barnett moved to suppress evidence/quash arrest (Doc. 11). Barnett argues that the search that the St. Clair County Probation office and the St. Clair County Sheriff's Department made on April 15, 2003 was without a warrant,

probable cause and/or any form of reasonable suspicion of criminal activity or conduct violative of the terms of his intensive probation. On February 10, 2004, the Government filed a response arguing that the search was conducted pursuant to a consent given by Barnett when he was placed on intensive probation and was based on reasonable suspicion since Barnett had tried to get the probation officer to leave his house by lying about his disabled son being inside the home resting (Doc. 13). Subsequently, the Court held a hearing on the motion on February 17, 2004. The Court rules as follows.

II. Motion to Suppress

In March 2003, Barnett was the subject of two or three felony cases in St. Clair County, Illinois, during which counsel represented him and he was the beneficiary of a bargained-for agreement, and Conditions of Intensive Probation Supervision. The Conditions of Intensive Probation substituted intensive probation for prison time for this previously convicted felon. **(See Gov. Ex. 1 Par. 10(h) and the testimony of Probation Supervisor Chester, who testified that Barnett was a five time-convicted felon)**. Given the conditions for Barnett's intensive probation, it is reasonable to infer that while the judge who sentenced Barnett found that reasonable grounds existed to allow him to receive such a disposition, that Barnett's case warranted very close scrutiny by the St. Clair County Probation Department.

During oral argument, defense counsel conceded that Barnett signed and consented to the Conditions of Intensive Probation Supervision and that the

Conditions of Intensive Probation Supervision constituted a bargain between Barnett, St. Clair County and the People of the State of Illinois.

Paragraph 10 of the Conditions of Intensive Probation Supervision outlines the “Specific Rules and Regulations of Intensive Probation Supervision (**Gov. Exhibit 1, ¶ 10**). Subparagraph “c” is the most relevant to this motion and it provides:

Submit to searches of your person, residence, papers, automobile, and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings.

On April 15, 2003, George Chester, the supervisor of the Intensive Probation Supervision Unit of the Probation Department, sought authority from the St. Clair County State’s Attorney’s Office to conduct a warrantless search of Barnett’s residence. Chester felt that Barnett’s actions in his office that day established reasonable suspicion of illegal contraband or activity. His based his belief on Barnett’s reaction to an arrest effected that day for Barnett’s failure to appear in court on some undisclosed matter. Chester testified that Barnett “overreacted” to that arrest, for the purported reason that Barnett had a woman in his car whom he did not want his wife to discover. Following the encounter with Barnett, Chester looked fully into Barnett’s criminal background and found five felony convictions and numerous domestic battery issues. Based on these findings, Chester determined that there was reasonable suspicion that illegal contraband or activity was to be

found at Barnett's house. On the strength of that hunch, Chester received permission to search Barnett's home from the State's Attorney's Office.¹

Consequently, in the evening hours of the same day, Probation Officer Rodney Skinner, was directed to conduct a search of Barnett's residence. Officer Skinner, accompanied by two Sheriff's Department deputies for assistance, went to Barnett's home. Upon knocking on the door and obtaining Barnett's attention, Skinner advised Barnett that the officers were there to search his house pursuant to the condition's of his probation and to make sure he was abiding by the conditions of his probation. Barnett advised the officers that his handicapped son was in the house sleeping and asked if they could come back another time because he did not want the officers to disturb his son. Skinner responded that if Barnett would tell them what room the child was in, they would try not to disturb him, but reminded Barnett that it is a condition of his probation for them to come in and check his house. Skinner testified that Barnett "hesitated, but he allowed [them] to enter into the residence." **(February 17, 2004 Motion to Suppress Transcript; Skinner Testimony, p. 24, lines 3-4)**. The officers then conducted a search of the house, finding the evidence which is the subject of this criminal prosecution.

The Government supports this search based on two theories. First, on the consent entered into by Barnett on March 20, 2003, the Conditions of Intensive

¹ The Court notes that the Government did not assert Chester's hunches as a theory of reasonable suspicion to support the search in this matter.

Probation Supervision (**Gov.'s Exhibit 1**). Secondly, while not suggesting that reasonable suspicion existed when the instructions were issued by Supervisor Chester to Officer Skinner for the search, the Government asserts that once Officer Skinner was on the scene that an objective officer would have found reasonable suspicion based on Barnett's conduct at the door: his nervousness and his lie. In so arguing, the Government proposes that the Court disregard the subjective attitude of the searching officers.

There is really only one theory to discuss fully, since the Court finds that the last theory really does not hold water. Clearly, Officer Skinner was intent on doing what his supervisor instructed him to do, thus, Barnett's actions at the door relative to reasonable suspicion are of no consequence.

The only issue here is consent. The United States Supreme Court, considering a case similar to the one at bar, left this issue for another day. In ***United States v. Knights*, 534 U.S. 112 (2001)**, a probationer signed a similar consent to search. However, the facts of the case were such that the District Court found that reasonable suspicion supported the search and the Supreme Court did not need to reach the issue of whether the probationer's consent was adequate to give away all of his Fourth Amendment rights.

Here, by Barnett's admission, is a true bargained-for consent to search. The condition was one among many accepted in the place of going to prison. Along with the search came an agreement that if the search turned up something found to

be useful in a court of law, there was consent that it could be so used. Barnett was represented by counsel at the time of this transaction. A stay out of jail bargain certainly benefits Barnett, until the Probation Department makes good on its obligation to protect the public and initiates a search his home. Of course, that is the other consideration to such matters. Recognized in the ***Knights*** case is the serious recidivism rate of felons on probation and the need, therefore, to protect society while they attempt to make good on the chance they have been given in such bargains. Knowing that Probation was intent on searching his residence, Barnett would have liked nothing better than to send them away, on any excuse, in order to give him time to hide the contraband that lands him in federal court now.

What is not present in this case is a defendant who was involuntarily placed on probation, on whom conditions were imposed by a sentencing judge, and who has no right to refuse the conditions. Such a difference was discussed thoroughly with defense counsel during oral argument. While defense counsel “wished” he could agree with the latter description posed by the Court, he advised that the bargained-for description of the previous paragraph was the appropriate way to describe the proceedings that brought about the consent to search.

Consent has long been an exception to the need for a warrant to search. ***Zap v. United States*, 328 U.S. 624 (1946), vacated on other grounds 330 U.S. 800(1947); *Katz v. United States*, 389 U.S. 347 (1967); *Vale v. Louisiana*, 399 U.S. 30 (1969); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).** While not

factually the same, the **Zap** court, Justice Douglas speaking, dealt with a very similar issue. In order to do business with the Navy, a contractor had to agree to “allow its accounts and records to be open at all times to the Government and its representatives. . . .” **Zap, 328 U.S. at 627**. Acting on behalf of the Navy, the FBI conducted an audit of the petitioner’s books and records, despite his protest, seizing a check that was later used against him in a criminal prosecution. The trial judge denied the motion to suppress the introduction of the check at trial. Relying on **Davis**, the Court found, that one may waive his Fourth and Fifth Amendment rights. “And when petitioner, in order to obtain the government’s business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.” **Zap, 328 U.S. at 628**. The balance of the case dealt with the right of the inspector to take the check and to use it in court, which the Supreme Court decided the trial judge appropriately used his discretion in allowing. At bar, the consent actually provides for the use of seized items in court.

In **Schneckloth**, a case on which the **Knights** case relies as the gold standard for what constitutes “consent,” the Court held:

Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject’s knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to

demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

412 U.S. 248-249.

Waiving one's constitutional rights is certainly nothing new. Depending upon the right that is being waived, the safeguards that go along with that consent vary. Waiving one's right to remain silent requires detailed warnings. ***Miranda v. Arizona*, 384 U.S. 436 (1966)**. A trial judge who is considering a defendant's request to waive his Sixth Amendment right to counsel is well advised to spend time ensuring that the defendant does so with full knowledge of the pitfalls. ***Faretta v. California*, 422 U.S. 806 (1975), *Von Moltke v. Gillies*, 332 U.S. 708 (1948), *United States v. Bell*, 901 F.2d 574 (7th Cir. 1990)**. However, the judge who considers the validity of a consent search of a home only needs to know if the rightful occupant of the search said yes when asked for consent and not whether that person was first advised of all her rights in detail as alluded to with the Fifth and Sixth Amendment rights above. ***Schneckloth*, 412 U.S. 218 (1973)**.

Based on the circumstances of this case, it is abundantly clear that Barnett entered into the consent to search voluntarily. Not even Barnett contends that consent need be contemporaneous to the search itself. There is no suggestion, nor do the facts indicate, in the context of the manner in which the consent was given, that Barnett, at any time, formally attempted to withdraw his consent and discuss with the State Circuit Court and the Probation Department what alternatives were available to him.

Barnett argues that since the policy of the St. Clair County Probation Department (**Gov. Ex. 2**) requires reasonable suspicion, that by some adoption or bootstrapping theory, such policy is naturally part and parcel to all conditions of probation such as the one signed by Barnett. However, that theory does not carry the day with this Court. First of all, that policy is not what was presented to the Barnett. It is what Barnett knowingly consented to that is at issue. Secondly, that policy is merely a recitation of constitutional law for any probationer that has not waived his rights, as Barnett has.

The Court notes that it is entirely possible that the United States Supreme Court may one day look at this issue and rule, despite the fact that defendants are allowed to waive both their Fifth Amendment and Sixth Amendment rights, that as a probationer you cannot waive your Fourth Amendment right insofar as your home is concerned. However, this Court does not believe that will be the ruling. That the general policy is more restrictive for those probationers who do not consent than the actual consent that was signed by this particular probationer (and others like him) in a bargained-for deal to stay out of prison is of no consequence.

It is very important to society to maintain a watchful eye on probationers because of the very real threat of recidivism. For those probationers on whom conditions of probation are involuntarily imposed, unlike this case, a search of their premises only upon reasonable suspicion is appropriate and protects the rights of the probationer while looking after the interests of society. For this case and others like it, however, just as one can waive their Fifth and Sixth Amendment rights, so

should the courts recognize the right to waive their Fourth Amendment right, particularly when it is in a bargain in exchange for prison time. In fact, it seems only logical that this should automatically invoke a recognition of the need to respond to the need to protect the public.

III. Conclusion

Accordingly, the Court **DENIES** Barnett's Motion to Suppress Evidence/Quash Arrest (Doc. 11). The Court **SETS** this matter for jury trial on Monday, March 15, 2004 at 9:00 a.m. The time from the filing of the motion, February 4, 2004, until the date this decision is excluded from consideration under the Speedy Trial Act.

IT IS SO ORDERED.

Signed this 27th day of February, 2004.

/s/ David RHerndon
DAVID R. HERNDON
United States District Judge